STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NE 32ND STREET LLC; HILLSBORO INLET INVESTMENTS, LLC; BROWARD ICW INVESTMENTS, LLC; AND SOUTH SPANISH TRAIL, LLC,

Petitioners,

vs. Case No. 21-2495RX

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND AND THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FINAL ORDER

This case came before Administrative Law Judge ("ALJ") Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing on November 12, 2021, at a site in Tallahassee, Florida, and by Zoom conference.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Petitioners, NE 32nd Street LLC, Hillsboro Inlet Investments, LLC, Broward ICW Investments, LLC, and South Spanish Trail, LLC, have standing to challenge specified portions of Florida Administrative Code Chapter 18-21; and, if so, whether existing rules 18-21.002; 18-21.003(2), (3), (23), (29), (32), (33), (34), (35), (39), (62), (64), (66), (67), (68), (69), (75), (76), (77); 18-21.004(1)(a), (b), (e), (g), (h), (i), (j), (k), (2)(a), (b), (e), (g), (h), (i), (4)(a), (b)2.e, (5)(b), (8); 18-21.005(1)(c), (d), (e), (f), (2), (3); 18-21.0056(1)(a), (2)(a); 18-21.008(1)(a), (b), (2); 18-21.0082(2)(a)9.; 18-21.009(1)(g), (h), (2), (3); 18-21.010(1)(h), (4); 18-21.011, and 18-21.019 ("challenged rules"), are an invalid exercise of delegated legislative authority in violation of sections 120.52(8)(d) and (e), Florida Statutes (2021), because they are vague, fail to establish adequate standards for agency decisions, vest unbridled discretion in the agency, and are arbitrary or capricious.

PRELIMINARY STATEMENT

On August 17, 2021, Petitioners filed a petition challenging a "portion of chapter 18-21, Florida Administrative Code." On August 18, 2021, Petitioners filed a corrected petition. On August 19, 2021, a telephonic status conference was held with counsel for the parties, during which the parties agreed to waive the 30-day requirement to conduct the final hearing and requested that the final hearing not be scheduled.

On August 26, 2021, Petitioners filed an amended petition. On September 2, 2021, Respondents, The Board of Trustees of the Internal Improvement Trust Fund, and Florida Department of Environmental Protection, filed a motion to dismiss the amended petition. On September 9,

2021, Petitioners filed a response in opposition to the motion. On September 10, 2021, the undersigned entered an Order denying the motion.[1]

On September 16, 2021, a telephonic pre-hearing conference was held with counsel for the parties participating in the conference. Following the conference, the undersigned entered an Order setting the final hearing for November 12, 2021. On November 10, 2021, Respondents filed a motion for official recognition.

The final hearing was held on November 12, 2021, at a site in Tallahassee, Florida, and by Zoom conference. At the outset of the hearing, the undersigned addressed the motion for official recognition, granting the motion in part, and denying it in part. Respondents also made a separate ore tenus motion for official recognition, which was unopposed and granted. Joint Exhibit 1 was received into evidence. Petitioners presented the testimony of William Swaim and Rod Maddox. Petitioners' Exhibits 1 through 11 were received into evidence upon stipulation of the parties. Respondents presented the testimony of Richard Malloy. The Department's Exhibit 13 was received into evidence upon stipulation of the parties.[2]

At the hearing, the parties waived the requirement under section 120.56(1)(d) for the undersigned to render this Final Order within 30 days of the hearing, and the deadline for filing proposed final orders was set for no

[1] Throughout this Final Order, Petitioners will be referred to either by a shortened version of their individual names ("NE 32nd Street," "Hillsboro Inlet," "Broward ICW," "South Spanish Trail"), or, collectively, as "Petitioners." Respondents will be referred to either by a shortened version of their individual names ("BOT," or "Department"), or, collectively, as "Respondents."

[2] Petitioners' Exhibits 10 and 11 are transcripts of the depositions of Mr. Malloy and Mr. Maddox, taken by Petitioners in this case, and filed at DOAH on January 28, 2022. The Department's Exhibit 13 is the transcript of Mr. Swaim's deposition taken in this case and filed at DOAH on November 12, 2021.

later than 30 days after the filing of the final hearing Transcript. The two-volume final hearing Transcript was filed at DOAH on December 13, 2021, and, therefore, the parties' proposed final orders were due by January 12, 2022. Respondents timely filed their Proposed Final Order on January 12, 2022. However, Petitioners did not file their Proposed Final Order until January 13, 2022, one-day late. There is no prejudice to Respondents because of Petitioners' late-filed Proposed Final Order. Accordingly, the parties' Proposed Final Orders have been considered in the preparation of this Final Order.

On November 9, 2021, the parties filed their Joint Pre-Hearing Stipulation, in which they stipulated to certain facts. These facts have been incorporated into this Final Order to the extent indicated below. Unless otherwise indicated, all statutory and rule references are to the 2021 versions.

FINDINGS OF FACT

Parties and Standing

1. There are between 9,000,000 and 11,000,000 acres of state lands in the state of Florida. The BOT is a state agency holding title to state lands "in trust for the use and benefit of the people of the state pursuant to s. 7, Art. II, and s. 11, Art. X of the State Constitution." § 253.001, Fla. Stat.

2. The Department is a state agency with delegated legislative authority to perform certain duties and functions on behalf of the BOT. §§ 253.01, 253.02, and 253.002, Fla. Stat.

3. Chapter 18-21 governs the "management" of sovereignty submerged lands ("SSL"), including the issuance of leases, easements, and other authorizations over SSL.

4. Rule 18-21.003(67) provides the following definition of SSL:

> (67) "Sovereignty submerged lands" means those lands including but not limited to, tidal lands, islands, sand bars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters, to which the State of Florida acquired title on March 3, 1845, by virtue of statehood, and which have not been heretofore conveyed or alienated. For the purposes of this chapter sovereignty submerged lands shall include all submerged lands title to which is held by the Board.

5. Chapter 18-21 addresses how and when the Department may approve applications or requests to use SSL. However, chapter 18-21 does not provide a methodology for determining if submerged lands are, in fact, SSL and, therefore, owned by the State of Florida.

6. In fact, no administrative rule provides a methodology for determining if submerged lands are, in fact, SSL. In their amended petition, Petitioners allege the challenged rules are an invalid exercise of delegated legislative authority in violation of sections 120.52(8)(d) and (e), because they fail to provide a methodology for determining if submerged lands are, in fact, SSL.

7. Petitioners are limited liability companies registered to do business in Florida, formed for the purpose of developing real estate. William Swaim is the owner and a member of Petitioners.

8. NE 32nd Street claims ownership of approximately seven acres of property on NE 32nd Street in Boca Raton, Florida, located within submerged lands west of the Intracoastal Waterway and within the Intracoastal Waterway. NE 32nd Street plans to bulkhead, fill, and sell some lots and build boat docks in the submerged lands located within the Intracoastal Waterway.

9. Pursuant to chapter 18-21, the Department issued easements and authorizations over NE 32nd Street's property. At hearing, Mr. Swaim

testified that NE 32nd Street is restricted on selling or developing the property because of a cloud on the title of the property created by the Department's issuance of easements and authorizations pursuant to chapter 18-21. NE 32nd Street is currently involved in circuit court litigation against Respondents in Palm Beach County, Florida, involving a dispute over the ownership of submerged lands within the property.

10. Broward ICW claims ownership of several parcels of property located within submerged lands within the Intracoastal Waterway in Broward County, Florida, "north and south of the bridge to the ocean at the Hillsboro Inlet on the west side of the Intracoastal." Broward ICW acquired the property "for purposes of maximizing its property rights," which includes easements for utilities, density rights, drainage rights, dockage rights, and mineral rights. Broward ICW plans on developing a portion of the property seaward of the erosion control line.

11. Pursuant to chapter 18-21, the BOT issued leases on Broward ICW's property. At hearing, Mr. Swaim testified that Broward ICW is restricted on developing the property because of a cloud on the title of the property created by the Department's issuance of the leases pursuant to chapter 18-21. Broward ICW is currently involved in circuit court litigation against Respondents in Broward County, Florida, involving a dispute over the ownership of submerged lands within the property.

12. Hillsboro Inlet claims ownership of property located within submerged lands in Broward County, Florida. Hillsboro Inlet acquired the property for purposes of development.

13. Pursuant to chapter 18-21, the BOT issued public easements and leases on Hillsboro Inlet's property. At hearing, Mr. Swaim testified that Hillsboro Inlet is restricted on developing the property because of a cloud on the title of the property created by the Department's issuance of the leases and easements pursuant to chapter 18-21. Hillsboro Inlet is currently involved in circuit court litigation against Respondents in Broward County,

Florida, involving a dispute over the ownership of submerged lands within the property.

14. South Spanish Trail claims ownership of several parcels of property located within submerged lands west of the "ICW waterway in Porto Mar Subdivision," south of Bel Meadow Park Bridge. South Spanish Trail acquired the property to obtain drainage and density rights, similar to the business purpose of Broward ICW.

15. Pursuant to chapter 18-21, the Department issued authorizations to allow third parties to install fiberoptic cables and conduits on the property. South Spanish Trail is currently involved in circuit court litigation against Respondents in Palm Beach County, Florida, involving a dispute over the ownership of submerged lands within the property.

16. Petitioners have standing to challenge the subject rules. Petitioners are substantially affected by the challenged rules because the Department issued leases, easements, and other authorizations over Petitioners' properties pursuant to the challenged rules.

The Challenged Rules Are Not an Invalid Exercise of Delegated Legislative Authority in Violation of Sections 120.52(8)(d) and (e)

17. Turning to the merits of Petitioners' rule challenge, within the Department's Bureau of Survey and Mapping is the Title and Land Records section ("TLRS"). The TLRS receives requests to make title determinations on behalf of the BOT, and the TLRS makes title determinations on behalf of the BOT.

18. Requests to the TLRS for title determinations are typically received from multiple sources, including Department district offices and water management district offices, when evaluating a permit request, and from private individuals. Between approximately 2,000 and 3,000 SSL title determinations are made by the TLRS on an annual basis.

19. When making submerged land title determinations, Department staff research whether the water body itself is considered sovereign. To this end,

one basic question is the issue of whether a given water body was navigable at the time Florida became a state. This issue may be more or less complex given the specific water body at issue. There is no dispute as to the navigability of the Gulf of Mexico or Atlantic Ocean. However, researching the navigability of bays, estuaries, or smaller water bodies may be complex.

20. There is no one-size-fits-all for making SSL title determinations. SSL title determinations require an individualized, case-by-case analysis and determination, with unique factors and considerations applicable to each case.

21. An SSL title determination may require a consideration of a multitude of factors and a review of many sources, such as original deeds or patents, historical aerial photographs, surveys, maps and charts, and any other pertinent information that might address the sovereignty of state land.

22. Staff regularly confer and collaborate with Department legal counsel regarding legal issues and consider existing case law. There are occasions where the interpretation offered by the Department's legal counsel differs from the interpretation offered by an attorney for an interested party. In those situations where the parties do not agree, the title dispute is resolved by a circuit court, and the outcome of the litigation in the judicial forum is binding and accepted by the BOT and the Department, as staff for the BOT.

23. Staff may also confer with the United States Bureau of Land Management, coastal engineers, coastal geologists, and soil scientists to evaluate certain site-specific issues. Staff may also confer with outside historians and review newspaper accounts, journals, diaries of the early settlers of Florida, and similar information.

24. Different sources of information regarding title issues, such as geodetic surveys and field notes to surveys, may be more or less persuasive in a given set of factual circumstances.

25. Given the complexities and site-specific nature of title determinations involving submerged lands, it is understandable that no rule exists requiring

a methodology for determining how Department staff make title determinations for SSL.

26. Requiring a rule that provides a methodology for determining title to SSL is not practicable.

CONCLUSIONS OF LAW

27. Under section 120.56(1)(a), "[a]ny person substantially affected by a rule . . . may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." An existing rule may be challenged at any time during its existence. §120.56(3)(a), Fla. Stat. "The administrative law judge may declare all or part of a rule invalid." §120.56(3)(b), Fla. Stat.

28. A party is substantially affected if the rule will result in a real or immediate injury in fact and the alleged interest is within the zone of interest to be protected or regulated. *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005). Generally, the fact that a party is subject to a rule has been held to be sufficient to demonstrate that the party is substantially affected by the rule. *ABC Fine Wine and Spirits v. Dep't of Bus. and Pro. Regul.*, 323 So. 3d 794, 797 (Fla. 1st DCA 2021).

29. In the instant case, Petitioners are substantially affected by the challenged rules and have standing to challenge them. As detailed above, Petitioners are substantially affected by the challenged rules because they are subject to the rules. Respondents relied on the rules in issuing easements, leases, or other authorizations involving title to, and the use of, Petitioners' properties.

30. Turning to the merits, Petitioners have the burden of proving by a preponderance of the evidence that the challenged rules are an invalid exercise of delegated legislative authority as to the objections raised. §120.56(3)(a), Fla. Stat.

31. The definition of "invalid exercise of delated legislative authority" is set forth in section 120.52(8), which provides, in pertinent part:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
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> ***
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

32. An administrative rule is invalid under section 120.52(8)(d) if it requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning. *State Dep't of Elder Affs. v. Fla. Senior Liv. Assoc., Inc.*, 295 So. 3d 904, 914 (Fla. 1st DCA 2020); *Sw. Fla. Water Mgmt. Dist. v. Charlotte Cnty.*, 774 So. 2d 903, 915 (Fla. 2d DCA 2001). An administrative rule is arbitrary under section 120.52(8)(e) if it is not supported by logic or the necessary facts, and capricious if it is adopted without thought or reason or is irrational.

33. In the instant case, Petitioners failed to prove by a preponderance of the evidence that the challenged rules are vague, fail to establish adequate standards for agency decisions, vest unbridled discretion in the agency, or are arbitrary or capricious, because they fail to provide a methodology for determining title to SSL. The challenged rules properly provide a mechanism for managing the use of SSL. The challenged rules are not designed to provide a methodology for determining whether certain lands are, in fact, SSL. As detailed above, there are many factors involved in making a

submerged land title determination, each depending upon the facts of the specific case and applicable law. It would be impracticable to require a methodology in the challenged rules for making submerged land title determinations.

34. Petitioners' reliance on *Florida Department of Business and Professional Regulation v. Target Corporation, et. al.*, 321 So. 3d 320 (Fla. 1st DCA 2021), and other cases cited in their Proposed Final Order, are misplaced. In *Target*, a statute expressly required that a "Consumption on Premises (COP) liquor licensee" not sell items other than those "customarily sold in a restaurant," and the statute listed items customarily sold in a restaurant. The statute further provided that a licensee could petition the Division for permission to sell products other than those listed in the statute, provided the licensee could show the "item is customarily sold in a restaurant." The agency attempted to clarify by rule what items are "customarily sold in a restaurant," but the court determined the rule was vague because the rule did not provide direction regarding what items the Division would consider as being "customarily sold in a restaurant." Because no sufficient standard was provided in the rule, the court held the rule was vague and vested unbridled discretion in the Division. *Id*. at 325.

35. On the other hand, the determination of the rights of parties involved in a title dispute is ultimately subject to judicial resolution in circuit court under all applicable law. Art. V., § 20(c)(3), Fla. Const.; § 26.012(2)(g), Fla. Stat.; *Bd. of Trs. v. Bd. of Pro. Land Surveyors*, 566 So. 2d 1358, 1361 (Fla. 1st DCA 1990).

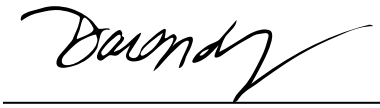
36. As detailed above, Petitioners have been embroiled in many years of litigation against Respondents in circuit court over title to the submerged lands. Any dispute involving issues relating to the title of the submerged lands are not issues to be resolved in an administrative forum, but are

instead properly reserved for circuit courts applying the applicable law to the particular facts of each case. *Bd. of Trs. v. Fla. Pub. Utils. Co.*, 599 So. 3d 1356, 1358 (Fla. 1st DCA 1992).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Amended Petition is Dismissed.

DONE AND ORDERED this 3rd day of February, 2022, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
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Filed with the Clerk of the
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this 3rd day of February, 2022.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.